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No. 259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

On Appeal from the Supreme Court of the State of Ohio

KENNETH AGEE,

Appellant,

vs.

THE COLUMBUS BAR ASSOCIATION,

Appellee.

PETITION FOR REHEARING AFTER DISMISSAL OF APPEAL FOR WANT OF JURISDICTION

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Appellant respectfully prays for a rehearing and for a reversal of the order herein of October 12, 1964, whereby the appeal was dismissed for want of jurisdiction, and the papers being treated as a petition for writ of certiorari, certiorari was denied.

THE PROCEEDINGS BELOW

On July 28, 1962, a complaint was filed with the Board of Commissioners on Grievances and Discipline for the State of Ohio which alleged that the respondent therein named, appellant herein, had been guilty of misconduct as defined by Section 5 of Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio. Appellant's motion to make definite and certain was overruled. Trial was had upon five separate allegations of appellant's misconduct, viz.:

1. Solicitations of professional employment.
2. Maintenance of an association with persons not admitted to the practice of law, with apportionment of fees with such persons.
3. Delegation of legal responsibility to appellant's employees who had not been admitted to the practice of law.
4. Maintenance of relations with persons not admitted to the practice of law, permitting exploitation of appellant's professional status by such persons.
5. Distribution of cards asserted to have constituted advertising.

The foregoing charges are a part of the record herein and are set out at greater length at pp. 6 and 7 of the Jurisdictional Statement herein.

Trial in the form of an evidentiary hearing was had upon the issues joined by appellant's general denial before a Panel of three Commissioners. (Section 10 of said Rule XXVII) The matter proceeded to review, upon the said Panel's finding of grounds for indefinite suspension of appellant from the practice of law, before the entire Board of Commissioners on Grievances and Discipline. (Section 14 of said Rule XXVII) The said Board filed, on May 13, 1963, its Findings of Facts, Conclusions and Recommendation in the Supreme Court of the State of Ohio. (Section 15 of said Rule XXVII) On January 29, 1964, after compliance with Sections 16 through 18, inclusive, of said Rule XXVII, the Supreme Court of the State of Ohio entered the judgment from which this appeal has been taken. Said judgment confirmed the report of the said Board of Commissioners and ordered the appellant herein suspended indefinitely from the practice of law in the State of Ohio. Application for rehearing of said judgment was denied by order of the Supreme Court of the State of Ohio on February 26, 1964.

Notice of appeal was filed in the Supreme Court of the State of Ohio on March 9, 1964, and on March 11, 1964, the Supreme Court of the State of Ohio stayed execution of the judgment appealed from pending final disposition of the appeal.

The said judgment of the Supreme Court of the State of Ohio is reported at 175 Ohio State Reports at pages 443 to 447, inclusive, and is set out in full in the Appendix to the Jurisdictional Statement filed herein. The notice given in accordance with Section 19 of the said Rule XXVII appears at page 130 of the Ohio Bar of February 10, 1964. The *Ohio Bar* is the publication of the Ohio State Bar Association. Defectively reproduced in the Appendix to the Jurisdictional Statement filed herein, said notice is set out fully and correctly immediately below.

"KENNETH W. (sic) AGEE AND STANLEY R. JURUS, JR., INDEFINITELY SUSPENDED FROM PRACTICE"

"Kenneth W. (sic) Agee and Stanley R. Jurus, Jr., both of Columbus, were definitely suspended from the practice of law by the Supreme Court of Ohio on January 29, 1964, for violations of the Canons of Professional Ethics.

"Recommendations of the suspensions were made by the Court's Board of Commissioners on Grievances and Discipline following hearings on complaints filed by the Columbus Bar Association.

"In the Agee matter the Court held that services to a claimant in an Industrial Commission case were always legal services when rendered by a lawyer, and that respondent could not ethically divide his fees for such services with a layman, even though the layman could have performed the same services.

"In the Jurus matter the Court found that respondent had paid laymen for soliciting Industrial Commission claimants on his behalf and that he had destroyed his files in several instances because affidavits had been

filed with the Industrial Commission charging him with solicitation.

"(This notice given in accordance with Section 19 of Rule 27 of the Supreme Court of Ohio.)"

On May 8, 1964, an order was made and entered in the Supreme Court of the United States by which the time within which to docket the case and file the record on appeal was extended to, and to include, July 7, 1964. On or before said date, the Jurisdictional Statement was filed herein, the record on appeal had been filed, and the case was docketed.

The petition for rehearing is filed under favor of jurisdiction conferred by Section 1257 (2) and (3) of Title 28 of the United States Code and by Rule 58 (1) of the Revised Rules of the Supreme Court of the United States to review on appeal from, or by writ of certiorari to, the Supreme Court of the State of Ohio said judgment of January 29, 1964, and said order of February 26, 1964.

GROUNDS UPON WHICH PETITION FOR REHEARING IS BASED

I. It was pointed out by the Jurisdictional Statement herein that retroactive effect had been given the rule pronounced in the *Unauthorized Practice of Law Committee of Cuyahoga County, Ohio* v. *Brown, Weiss and Wohl, et al.*, 175 O. S. 149, 192 N. E. 2d 54, decided July 10, 1963, as *Brown, Weiss and Wohl* v. *The Unauthorized Practice of Law Committee of Cuyahoga County, Ohio*, 84 S. Ct. 1136, certiorari denied, April 6, 1964; rehearing denied, 84 S. Ct. 1332, May 18, 1964. At page 130 of the *Ohio Bar* for February 10, 1964, by the notice of indefinite suspension of appellant from the practice of law in Ohio, quoted *supra*, it is made clear that the Columbus Bar Association knew,

on and before the initiation on July 28, 1962, of the disciplinary proceedings herein, twenty-nine days following the commencement of the disciplinary proceedings, June 29, 1962, in the *Brown, Weiss and Wohl* matter, *supra*., that the judgment therein would support the disciplinary proceedings commenced July 28, 1962, against the appellant herein. This conclusion is supported and borne out by the words of the notice set out above to the effect that services to a claimant in an Industrial Commission matter would be classified as the practice of law, overruling to that extent *Goodman* v. *Beall*, 130 O. S. 427, 200 N. E. 470, when that decision was not superseded until July 10, 1963, as has been already stated.

The attorney at law in the State of Ohio who is subjected to such machinations is denied his rights under the due process clause and the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States. The court of final resort in the circumstances must be the Supreme Court of the United States. Every forfeiture of anything of value possessed where the forfeiture is compelled and imposed by violation of the limitations imposed upon State action by Article I, Section 10, clause 1 of the Constitution of the United States constitutes a certain and complete denial of a Federal Constitutional right to remedy which the Supreme Court of the United States will grant appropriate relief.

II. The question of that which is the practice of law has been evaded, has not been decided upon any analysis whatever, or has been answered so evasively as, by its very illogic, to do violence to Federal Constitutional rights. The judgment appealed from states, after citing *Goodman* v. *Beall*, 130 O. S. 427, that, though laymen were permitted to practice before the Industrial Commission until the

said judgment in *Brown, Weiss and Wohl, supra.*, decided July 10, 1963, that circumstances is no defense to the charges of misconduct in the form of violation of certain of the Canons of Professional Ethics which prohibit the apportionment of fees with persons not admitted to the practice of law upon any basis whatsoever. But it is impossible judicially and logically to make of the practice complained of an offense against the Canons of Professional Ethics on the part of the appellant, punishable by the extreme penalty of indefinite suspension from the practice of law when the opinion itself recognizes that, prior to July 10, 1963, persons not admitted to the practice of law could engage in such representation and recognizes that appellant merely acted as custom, usage and the law permitted him, and all others so inclined to act; that it is merely for the reason that appellant is an attorney at law that he may be disciplined. In final analysis, appellant was disciplined by the indefinite suspension from the practice of law for the reason, solely, that the said Canons of Professional Ethics can be made to justify the discipline, severely, of an attorney at law for misconduct although the misconduct charged was a universal practice, engaged in by lawyers and persons not admited to the practice of law, alike.

III. The Jurisdictional Statement herein asserted that the discipline of an attorney at law under Rule of the Supreme Court of the State of Ohio, without regard to the statutory provisions set out in Section 4705.02 of the Revised Code of Ohio, was a denial of due process of law and of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of the elimination of the requirement that there be present in the misconduct charged, if the discipline is to

be severe, i. e., to go beyond private reprimand, the ingredient of moral turpitude. The Motion to Dismiss filed herein contained that statement at page 7 thereof,

> ". . . and consequently a violation of the canons will justify a disciplinary proceeding regardless of whether that violation involved moral turpitude."

Again those who bring the disciplinary proceedings were in position to anticipate rules, applications of rules and changes in rules to be applied to an attorney at law in disciplinary proceedings. On March 11, 1964, Rule XXVII of the Rules of Practice of the Supreme Court of the State of Ohio, the day on which the stay of execution was granted herein, was amended and became Rule XVIII of the said Rules of Practice. Section 5 (a) of said amended Rule XVIII now provides,

> ". . . Misconduct shall mean any violation of any provision of the oath of office taken upon admission to the practice of law, in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude."

The provisions of Section 6 of said amended Rule XVIII of the Rules of Practice of the Supreme Court of the State of Ohio are essentially unchanged and thus authorize disciplinary proceedings which may permit indefinite suspension of an attorney at law, or his disbarment, or a public reprimand, or a private reprimand upon a finding that he has been guilty of misconduct. But the first two of the foregoing permissible and authorized penalties constitute forfeitures and deprivations of the right to earn a livelihood, both of which are protected by the Fourteenth Amendment to the Constitution of the United States. The lesser pen-

alties of reprimand, public or private do not, of course, constitute deprivations of the right to earn a livelihood, nor does either constitute a forfeiture. It is our wish to formulate and to draw attention to the great difference between the two types of penalty. It is urged that, where the ingredient of moral turpitude is absent from the misconduct found, if misconduct is found, the severer penalties ought not, in justice, be applied. If the severer penalties are to be applied the authorities carrying out the disciplinary proceedings should properly be required to proceed under the Statute (Section 4705.02 of the Revised Code). The proceedings under the said Rule XXVII (now amended, Rule XVIII) should be limited to the penalties of reprimand, for otherwise Federal Constitutional rights are violated. It is desired also to point up the *ex post facto* effect, also here complained of and deplored and relief against the same asked, of the application of the concept of misconduct *sans* moral turpitude in the proceedings herein when it was not until after the proceedings that, by the provisions of the Rule proceeded under (former Rule XXVII) that moral turpitude ceased to be a requirement to disciplinary proceedings.

CONCLUSION

The violations, offenses, or the misconduct upon which the disciplinary proceedings herein were brought on July 28, 1962, on which the said Board of Commissioners acted, May 13, 1963, received their formulation as offenses, as misconduct only on July 10, 1963. The definition of misconduct which does not require that there be moral turpitude therein as the grounds for the more severe penalties did not receive formulation until after the disciplinary proceedings had been concluded in the Supreme Court of

the State of Ohio. It is unconscionable that a citizen should be thus deprived of privileges and immunities by State action.

It is respectfully urged that the extreme unfairness of the penalty of indefinite suspension from the practice of law upon *ex post facto* condemnation of conduct, in that the conduct was not disapproved until after the dates of commission of the acts considered misconduct in and by the judgment appealed from should be recognized as such unfairness. It is urged that the unfairness be corrected by the Supreme Court of the United States by the exercise of its jurisdiction to review the said judgment on appeal.

Respectfully submitted,

GEORGE E. TYACK,
ALEXANDER H. MARTIN, JR.,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

It is hereby certified that the above petition for rehearing is presented in good faith and not for delay.

ALEXANDER H. MARTIN, JR.,
GEORGE E. TYACK,
Attorneys for Appellant.

Dated: November 4, 1964
Columbus, Ohio

CERTIFICATE OF SERVICE

I, George E. Tyack, and I, Alexander H. Martin, Jr., attorneys for the appellant herein, each a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of November, 1964, we served copies of the foregoing Petition for Rehearing after Dismissal of Appeal for want of jurisdiction upon the Columbus Bar Association, the appellee herein, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to appellee's attorneys of record as follows:

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